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No. 85-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRED S. NOLAN, et al.,

Petitioners,

vs.

OTIS ELEVATOR COMPANY and the ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

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BRIEF OF RESPONDENT OTIS ELEVATOR COMPANY IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Where the Supreme Court of New Jersey ruled unanimously that the ADEA is not impaired by ERISA preemption of petitioners' direct age discrimination suit under the New Jersey Law Against Discrimination—because the suit relates to an employee benefit plan, would be time-barred under the ADEA and was filed without prior recourse to the available mediative processes of the New Jersey Division on Civil Rights—is there any basis for review by this Court?*

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* Petitioners' statement of Questions Presented is overbroad and incorrect. Because of its ruling that the direct suit enforcement provision of the New Jersey Law Against Discrimination was preempted, and with it petitioners' claim, the New Jersey Supreme Court did not have to, and did not in fact, resolve the merits of the underlying employment practice challenged, although it did note "... the apparent impediments to [the] claim posed by the savings provisions of ... [section 4(f)(2) of] the federal Age Discrimination in Employment Act." Pet. App. 3. The legality of respondent's plan thus is not an issue ripe for review. In any event, as we demonstrate in part III, *infra*, the plan at issue is plainly lawful under controlling federal standards.

PARTIES IN THE SUPREME COURT OF NEW JERSEY

Otis Elevator Company**

Fred S. Nolan, *et al.* (Pet. ii)

Attorney General of New Jersey as Intervenor

** Respondent Otis Elevator Company is a wholly-owned subsidiary of United Technologies Corporation. Excluding its wholly-owned subsidiaries, the subsidiaries of Otis Elevator Company are:

Asenseurs Gendre Otis S.A.; Val-Lift S.A.; Ascensores Otis S.A.; China Tianjin Otis Elevator Company Ltd.; Elevadores en Servicio, S.A. de C.V.; Caricor Ar Condicionado e Refrigeracao de Brasil Ltda.; Freissler Otis G.m.b.H.; National Trading Corporation S.A.L.; Nippon Otis Elevator Company; Sito Realty Company, Inc.; Otis Elevator Company (Kuwait); Otis Elevator Company (H.K.) Limited; Otis Elevator Company (India) Limited; Otis Elevator Company Limited (South Africa); Guide Rails Pty. Ltd.; Otis Elevator Company S.A.E. (Egypt); COMPORTEL, S.A.R.L.; Otis Elevator Saudi Arabia Ltd.; Otis Europe S.A.; Ascendes S.A.; Ascenseurs Dunet S.A.; Ascenseurs Walter Sangalli, S.A.; Establissements Camus; Otis Maroc S.A.; SARI Otis (Gestion), S.A.; SARI Otis (Maintenance), S.A.; Flohr-Otis Aufzuege G.m.b.H.; Brinkman Liften B.V.; Ascenseurs Clerebout S.A.; Essener Aufzugsfabrik Bruno-Haack G.m.b.H.; Stigler Otis, S.p.A.; Tatung Otis Elevator Company; Carrier-U.K. Distribution Limited; Zardoya Otis, S.A.; Angulo S.A.; ELEMA S.A.

The following subsidiaries of United Technologies Corporation are significant subsidiaries within the meaning of Regulation SX of the Securities and Exchange Commission's General Accounting Regulations:

United Technologies Automotive Holdings, Inc.; Carrier Corporation; Essex Group, Inc.; Norden Systems, Inc.; Otis Elevator Company; Otis Europe, S.A.; Pratt and Whitney Canada, Inc.; United Technologies Financial Services.

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BRIEF OF OTIS ELEVATOR COMPANY IN OPPOSITION TO CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of New Jersey review of which is sought is reprinted in Appendix A to the petition at 1a—50a, cited herein as "Pet. App. ___a.".

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED

In addition to the statutes set forth in the petition, this case also involves sections 14(a) and (b) of the federal Age Discrimination in Employment Act (29 U.S.C. §§ 633(a), (b)), sections 10:5-13, 5-14 and 5-18 of the New Jersey Law Against Discrimination, and N.J.S.A. § 2A:14-1. These provisions are set forth in Appendices A-C hereto.

COUNTERSTATEMENT OF THE CASE

In this state law age discrimination suit, petitioners claim that during a reduction in force prompted by adverse business conditions in late 1979, respondent Otis Elevator Company ("respondent") unlawfully gave greater benefits to older workers in a voluntary supplemental early retirement incentive plan than it provided to younger workers by way of severance pay when the facility subsequently closed in December, 1980. Pet. App. 3a, 4a-5a, 7a, 12a. That plan—the Harrison Special Supplemental Retirement Plan or "HSSRP"—was designed to encourage early retirement so as to reduce the impact of the reduction on the older workers and to make remaining employment opportunities available to persons in petitioners' age bracket. *Id.* 7a–8a.

Integral to the HSSRP was its incentive feature, which consisted of a supplemental layer of early retirement benefits over and above the normal benefits and a limited "window" period by which eligibility was defined. The supplemental benefits were keyed by formula to the amount of early retirement benefits payable under the Otis Basic Retirement Plan for

Salaried Employees ("OBRPSE").[1] To qualify for the HSSRP, employees had to achieve eligibility for early retirement under the OBRPSE (i.e. have 25 or more years of service and be age 55 or older) by June 30, 1980, the end of the "window" period, and elect to retire early under the OBRPSE. *Id.* 6a-7a, 11a-12a.

Petitioners are a group of former salaried managerial employees who met the length of service but not the attained age criterion of the HSSRP by the "window" cut-off date of June 30, 1980. *Id.* 4a. That is, as of June 30, 1980, none of the petitioners was eligible to retire early under the OBRPSE and, accordingly, there was no way to open the HSSRP to them under the terms of the plan. Following the respondent's decision in May, 1980 to close the plant by the end of 1980, petitioners received severance benefits of one week's salary for each year of service, and miscellaneous other benefits. *Id.* 4a, 12a. All petitioners have vested pension benefits under the OBRPSE which become payable when they attain the plan's various eligibility ages and elect to begin receiving payments. *Id.* 5a.

On May 12, 1982, petitioners filed a complaint of age discrimination in the New Jersey Superior Court of Harrison County pursuant to the right of direct suit in N.J.S.A. § 10:5-13, New Jersey Law Against Discrimination ("NJLAD", N.J.S.A. § 10:5-1 *et seq.*). *Id.* 13a. By electing to proceed directly to Superior

[1] The HSSRP is a nonqualified deferred compensation plan for management employees within the meaning of ERISA and U.S. Labor Department pronouncements. 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1); *see, e.g.* U.S. Dept. of Labor Opin. Nos. 75-48 (Dec. 23, 1975), 75-64 (Aug. 1, 1975), and 75-63 (July 22, 1975).

Court, petitioners bypassed entirely the New Jersey Division on Civil Rights ("NJDCR"), the state counterpart to the federal Equal Employment Opportunity Commission ("EEOC"), which is authorized to investigate promptly age discrimination charges, to determine probable cause and to resolve charges through voluntary means including ". . . conference, conciliation and persuasion." N.J.S.A. § 10:5-13, 5-14; 29 U.S.C. § 626(d).[2]

Following removal to and remand on procedural grounds from the United States District Court for the District of New Jersey, the Superior Court of New Jersey granted respondent's motion for summary judgment on the basis that preemption of petitioners' NJLAD claim does not "alter, amend, modify, invalidate, impair or supersede" the ADEA within the meaning of section 514(d) of ERISA, 29 U.S.C. § 1144(d).[3] The Appellate Division reversed, holding, *inter alia,* that the applicable time limitation for petitioners' suit under N.J.S.A. § 10:5-13 is six years. N.J.S.A. 2A:14-1; Pet. App. 63a. On certification, the Supreme Court of New Jersey reinstated the judgment of the Superior Court dismissing the complaint but did not disturb the Appellate Division holding with respect to the applicable NJLAD statute of limitation. *Id.* 40a, 50a.

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[2] An administrative charge by petitioners under the NJLAD on May 12, 1982 would have been time barred since administrative charges under the NJLAD must be filed within 180 days after the alleged discriminatory event. N.J.S.A. § 10:5-18.

[3] For the sake of brevity, the ERISA section 514(d) language will be summarized hereinafter simply by use of the word "impair." The full relevant text is quoted at Pet. App. 4-5.

In a unanimous ruling, the Supreme Court of New Jersey held that, as both lower courts found and the parties agreed, petitioners' NJLAD claim "relates" to a plan, the HSSRP, which is an employee benefit plan within ERISA's meaning. 29 U.S.C. §§ 1002(3), 1144(a); Pet. App. 19a-20a, 55a-56a, 83a-85a. Petitioners' claim is thus preempted unless preemption would "impair" a federal law, here the ADEA. 29 U.S.C. § 1144(d); Pet. App. 20a. Since petitioners' direct suit under the NJLAD filed on May 12, 1982 concededly was barred under the ADEA (Pet. 25), the Court defined the issue as ". . . whether the suit brought under the longer [six year] period of limitation, without any state mediative process, furthers the goals of the ADEA so as to escape ERISA preemption." *Id.* 40a, 29a-30a. Stated another way, under the clear language of ERISA Section 514(a) and this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), "the question of the availability of the state remedy sought turns on whether it is necessary to the continued life of the federal program." Pet. App. 25a. Answering each of these questions in the negative, the Court held that preemption by ERISA of petitioners' defunct ADEA claim does not impair the ADEA. *Id.* 3a.[4]

REASONS FOR DENYING THE WRIT

Summary Of Argument

In its unanimous opinion, the Supreme Court of New Jersey correctly held that in this age discrimi-

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[4] Contrary to petitioners' assertion (Pet. 19), respondent argued before both the Supreme Court of New Jersey and the Appellate Division that due to the preemptive effect of ERISA, petitioners' NJLAD suit is barred, *inter alia*, because untimely under the ADEA.

nation suit relating to an employee benefit plan, petitioners cannot, under the rubric of state law, seek relief from which inarguably they are foreclosed under the enforcement provisions of the federal ADEA. The claim is barred by the ADEA because it was filed outside the time limits of the ADEA and for the additional reason that petitioners failed to activate the ADEA enforcement scheme by first filing an administrative charge with either the state (NJDCR) or federal (EEOC) administrative agency, thereby negating any possibility of a mediated resolution of the controversy. In holding petitioners' claim preempted, the court below followed *to the letter* the clearly-expressed intent of Congress in ERISA section 514, 29 U.S.C. § 1144, as held by this Court to apply in the employment discrimination context in the landmark case of *Shaw v. Delta Airlines, supra.* The arguments made by petitioners, in contrast, stand ERISA section 514 on its head by asking that a claim extinguished by federal law be resurrected under state law.

The court below properly recognized that the ADEA does not depend in the least for its enforcement on a claim brought pursuant to N.J.S.A. § 10:5-13, which allows direct access to the courts at any time within six years. Under the *federal* enforcement scheme, the role of New Jersey, like that of any other state, is limited to providing an investigatory and mediative mechanism under the auspices of its administrative agency, the NJDCR, prior to litigation. That part of New Jersey's enforcement scheme upon which the ADEA thus depends not only is narrow but also was never activated by petitioners even though, under the ADEA, state agency process is to be invoked within,

at most, 300 days of the alleged discriminatory act. Pet. App. 28a-29a, 35a-45a.

The very limited preemption found by the court below does not in any way produce a ". . . disruption of the enforcement scheme contemplated" by the ADEA nor ". . . change the means by which [the ADEA] is enforced." *Shaw, supra,* 463 U.S. at 101, 102. All the decision requires of age discrimination claimants in New Jersey is that, if their claim relates to an employee benefit plan, they file a charge with the state agency within 300 days and prior to commencing a lawsuit, thus observing the federal requirement in the ADEA. The decision leaves New Jersey's role in the ADEA's enforcement scheme completely intact because it does not affect the status of the New Jersey Division on Civil Rights as a "deferral" agency under the ADEA or its ability to enforce the NJLAD in cooperation with the EEOC, even as to charges relating to employee benefit plans. Preemption was, under *Shaw,* both mandatory and correct, and the petition for a writ of certiorari should therefore be denied.[5]

I. Due To The Dominant Federal Interest In Consistent State and Federal Regulation of Employee Benefit Plans, Petitioners' Concededly Extinct Claim Under The ADEA Cannot Be Resurrected Under New Jersey Law

In a series of recent decisions, this Court repeatedly has emphasized the sweeping nature of the preemption provision in ERISA section 514(a), 29 U.S.C.

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[5] Petitioners' arguments as the legality of the plan under the ADEA are addressed in the Comments section hereof at pp. 18-23, below.

§ 1144(a). Although in *Shaw* the issue was preemption of a substantive rule of New York law inconsistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Supreme Court of New Jersey correctly ". . . perceive[d] in *Shaw* an underlying principle in favor of uniformity of administration of benefit plans." Pet. App. 23a. That principle, in turn, required preemption of petitioners' direct suit which, although filed within the applicable six year period of limitations of the NJLAD, was extinct under the ADEA. As *Shaw* followed Congress, so the court below followed *Shaw*, and the essence of its decision was simply and succinctly put: "How can it be said that the federal right 'depends on' the state program . . . when in a given case in the federal right has expired?" *Id.* 29a, *citing Shaw,* 463 U.S. at 103.

Nothing new is established by the New Jersey court's preemption of a limited portion of the NJLAD's remedial scheme. Contrary to petitioners' suggestion (Pet. 23), preemption is not confined to rules of state substantive law that conflict with their federal counterparts, even where preemption is implied. Given the interest in federal uniformity that the doctrine is designed to protect, preemption extends, quite naturally, to inconsistent state law enforcement and remedial provisions as well. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 241–42, 247 (1982).[6] This principle applies *a fortiori*

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[6] Even in the absence of an explicit preemption provision such as that in ERISA, under the Supremacy Clause of the Constitution this Court has found preemption of state laws whose procedures conflict or interfere with a federal regulatory scheme. Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 505-06 (1956). This rule applies even when federal law envisions

in the context of ERISA preemption, which is not only an *express* assertion of federal supremacy but also perhaps the *broadest* preemption provision ever enacted by Congress. *Shaw,* 463 U.S. at 96-97 and n.15. The court below correctly noted that ERISA's preemptive reach is as broad as its language, Pet. App. 21a, citing *Shaw,* 463 U.S. at 98, and that in enacting ERISA's "comprehensive and reticulated" provisions, "Congress took nothing for granted." Pet. App. 16a, 18a, *quoting Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980); *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504 (1981).

The need for preemption of inconsistent enforcement provisions of state law, when used to support claims relating to employee benefit plans, is strongly evidenced in the statements precisely to that effect by the principal congressional sponsors of ERISA, relied upon by this Court in *Shaw.*[7] In that decision,

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some role for state law. San Diego Building Trades Council v. Garmon, *supra;* Edgar v. Mite Corp., 457 U.S. 624, 630-40 (1982); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 579 (1981).

[7] "It should be stressed that with the narrow exceptions specified in the bill, the *substantive and enforcement* provisions of the conference substitute are intended to preempt the field for Federal regulation, *thus eliminating the threat of conflicting or inconsistent State and local regulation* of employee benefit plans." 120 Cong. Rec. 29933 (1974) (remarks of Senator Williams). "Finally, I wish to make note of what is to many the crowning achievement of this legislation, *the reservation to Federal authority the sole power to regulate the field of employee benefit plans.* With the preemption of the field, we round out the protection afforded participants *by eliminating the threat of conflicting and inconsistent State and local regulation.*" *Id.* at 29197 (Statement of Rep. Dent.), *quoted in* Shaw, *supra,* 463 U.S. at 99 (emphasis added).

the ERISA savings clause in 29 U.S.C. § 1144(d) was held to be a very narrow and specific one and limited to those ". . . state laws *upon which federal laws depend for their enforcement.*" *Shaw*, 463 U.S. at 104 (emphasis added). This Court invalidated so much of the New York pregnancy discrimination law that expanded the rights accorded under Title VII because, even with that limited preemption, Title VII "would . . . be enforced in precisely the same manner." *Id.* at 103.

Taking these predominant federal interests into account and informed by the teaching of *Shaw*, the Supreme Court of New Jersey properly recognized that the availability of relief to petitioners under the NJLAD must be measured by federal standards, including the ADEA period of limitation, not the far longer six year period otherwise applicable under the NJLAD. In finding that the federal limitations period is the appropriate yardstick, the court below directly relied on the precedent from this Court requiring that:

> [w]here a federal statute establishes a limitation period for the enforcement of federal rights, and that period is an integral part of the right created, that limitation must be applied in actions brought in state courts, whether the state statute be longer or shorter. Pet. App. 30a-31a.[8]

The primacy of the federal limitations period under the ADEA itself was underscored by this Court in *Oscar Mayer Co. v. Evans,* 441 U.S. 750 (1979),

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[8] *See* Del Costello v. Teamsters, 462 U.S. 151, 170-171 (1983); Engel v. Davenport, 271 U.S. 33 (1976); Atlantic Coast Line R. Co. v. Burnette, 239 U.S. 199 (1915); *see also* McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 228-230 (1958).

where, as the New Jersey Supreme Court noted (Pet. App. 32a), a shorter state period of limitations was to be ignored as inconsistent with federal policy.

The ADEA, of course, does impose rigorous limitations on the exercise of ADEA suit rights, which limitations are, *inter alia,* "... intended to promote the speedy, informal, non-judicial resolution of [age] discrimination claims." *See, e.g., McClinton v. Alabama By-Products Corp.* 743 F. 2d 1483, 1485 (11th Cir. 1984); *Wippel v. Prudential Insurance Co..,* 33 Fair Empl. Prac. Cases (BNA) 412 (D. Md. 1982). The law is crystal clear that age discrimination claimants cannot state an ADEA claim unless they first file an administrative charge within 300 days of the date of the accrual of their cause of action. 29 U.S.C. § 626(d)(2). The federal courts routinely enforce this time limit, which petitioners concede they did not meet. Pet. 25.[9]

Because the time limit within 29 U.S.C. § 626(d)(2) of the ADEA is "an integral part of the right created" under the ADEA, it is not a mere rule of procedure but, in fact, a *substantive limit* on the rights of petitioners, binding in the courts of New Jersey. *Whitfield v. City of Knoxville,* 756 F.2d 455, 461 (6th Cir. 1985). Emphasizing the substantive nature of the time limits written into the ADEA, the Sixth Circuit wrote:

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[9] *See, e.g.,* Reich v. Dow Badische Corp., 575 F.2d 363, 367-68 (2d Cir.), *cert. denied,* 439 U.S. 1006 (1978); Lutz v. Association Films, Inc., 552 F. Supp. 985 (S.D.N.Y. 1982); Quinn v. Bowman Publishing Co., 445 F. Supp. 780, 784-85 (D. Md. 1978); Travers v. Corning Glass Works, 76 F.R.D. 431, 432-33 (S.D.N.J. 1977).

> [W]here one jurisdiction [here, the federal government] by statute creates a new legal right unknown at common law and in the same statute limits the time period during which that right may be enforced, then the limitation is a condition attached to the underlying substantive right and does not limit merely the remedy.

756 F.2d at 461-62.

In light of the federal essence of petitioners' suit under New Jersey law and of the substantive character of the time limits within the ADEA, petitioners' argument that preemption does not apply here is utterly unconvincing.[10] Acceptance of their theory would mean that a suit indisputably due for peremptory dismissal under federal law could nonetheless be heard under state law, a result totally anomalous and unacceptable in view of the surpassing interest in federal uniformity of employee benefit plan administration expressed in ERISA.[11]

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[10] *Compare* Maynard v. Revere Copper Products, Inc., 773 F.2d 733 (6th Cir. 1985) (in area of federal supremacy, when claim under federal law would be time-barred, claim stated under state law could not survive; "[a] ruling to the contrary would mean that the uniformity required in determining limitations for such claims would be lost").

[11] In this regard, it is specious to assert, as petitioners have done, that *Shaw* was concerned only with inhibiting "the ability of employers to *create* plans" and thus restricted ERISA preemption to substantive rules of state law. Pet. App. 27 (emphasis supplied). ERISA's preemption language is grounded in a congressional intent to simplify the burden of *administering* plans by eliminating from the picture the wide variety of state laws that impact thereon. Although the facts in *Shaw* involved substantive rules of state law, the broad language and effect of

The decision of the court below avoids what otherwise would be regulatory chaos. Without preemption of the inconsistent state law enforcement provisions at issue here, an employee benefit plan such as the HSSRP would be subject to a patchquilt of widely varying limitations periods in each jurisdiction in which a multi-state company such as respondent operates. Since pension plans invariably involve many parties and large amounts of money, it is especially vital that age discrimination challenges be promptly identified and resolved within the period provided by federal law. Under the result advocated by petitioners, however, as the Supreme Court of New Jersey pointed out, "plan administrators would not know when repose was granted against claims of discrimination under the ADEA." Pet. App. 35a. Inconsistent state regulation, not the federal uniformity which it was a foremost purpose of ERISA to achieve, would be the sure result.

It is true, as petitioners say (Pet. 33), that the ADEA envisions state and federal cooperation in the enforcement of prohibitions against age discrimination. That proposition, however, begs the question presented. The ADEA requires only temporary "deferral" to state administrative *agencies* of charges *otherwise proper* under the ADEA.[12] *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). Nonetheless, as the

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the holding plainly encompass all state regulation of employee benefit plans including, necessarily, seriously clashing remedial and enforcement provisions. *See* f.n. 6, 7, *supra*.

[12] As we demonstrate in part II, below, petitioners' direct suit under NJLAD was not "otherwise proper" under the ADEA and, in fact, was entirely outside the ADEA structure of joint federal and state enforcement.

Supreme Court of New Jersey properly noted, *deferral does not enlarge the federal right.* (Pet. App. 35a). Moreover, giving effect to the longer limitations period of the NJLAD furthers neither of the oft-cited purposes underlying deferral:

> [W]e believe that invocation of the state judicial remedy after a federal remedy is no longer available does not further the federal program. There are two basic purposes for deferral: (1) to provide rapid and more expeditious disposition of cases, including mediation rather than litigation, and (2) to avoid burdening the federal system. Neither of these federal purposes is fulfilled by reversing the sequence contemplated by the ADEA. Pet. App. 38-39.

In this regard, petitioners' concern that the effect of the preemption here is to increase the burden on the EEOC and federal court system (Pet. 35) is misguided. Petitioners' failure in this case to activate the ADEA enforcement mechanism in a timely fashion means that their claim could never have been adjudicated in the federal arena, hence preemption of their claim could not possibly impose a burden on the federal system.

II. Preemption Of Petitioners' Claim Is Proper For the Independent Reason That Their Election To File A Direct Suit Under the NJLAD Negated The Opportunity for a Mediative Resolution That Is Required By The ADEA

A subsidiary but important basis of the decision of the Supreme Court of New Jersey is that the ADEA is not "impaired" by preempting petitioners' suit where petitioners, by filing directly in Superior Court,

sidestepped the mediative processes provided in the NJLAD under the auspices of the NJDCR. Pet. App. 40a.[13] Since the ADEA places no enforcement reliance on petitioners' direct suit under NJLAD § 10:5-13, no impairment to ADEA occurs with its preemption.

Upon the filing of a timely administrative charge, the ADEA mandates that the EEOC "... shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d). As the Supreme Court of New Jersey noted (Pet. App. 36a), the requirement of prior invocation of the administrative remedy serves the important ADEA goals of prompt notice, opportunity for mediative resolution and avoidance of litigation; ADEA suits are routinely dismissed when these prerequisites are not satisfied. *See* p. 11, *supra.* Like the administrative prerequisites of Title VII, these ADEA requirements are "... not legal hypertechnicalities ... [but] basic elements of the administrative remedy." *Martin v. Easton Publishing Company,* 478 F. Supp. 796 (E.D. Pa. 1979); *see also, Great American Savings & Loan Association v. Novotny,* 442 U.S. 366 (1979).

To trigger enforcement rights under the federal scheme, the ADEA also mandates prior resort to available state administrative remedies in "deferral"

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[13] As is its federal partner the EEOC, the NJDCR is authorized under the NJLAD to investigate promptly age discrimination charges lodged with it, to determine probable cause and is obliged to try to resolve charges through voluntary means short of judicial proceedings, including "... conference, conciliation and persuasion." N.J.S.A. § 10:5-13, 14; 29 U.S.C. § 626(d). The NJDCR has a work-sharing agreement with EEOC. *See, e.g.,* 29 C.F.R. § 1626.10.

states—i.e., those which have state agencies with mediative functions. 29 U.S.C. § 633(b);[14] *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).[15] In providing, through the NJDCR, an administrative opportunity for a conciliatory resolution before litigation within the time limit established by ADEA, the NJLAD does play a limited role in ADEA enforcement. *See,* 29 U.S.C. § 633. The decision of the New Jersey Supreme Court leaves that role completely intact.

By pursuing the option provided by New Jersey of a direct suit under the NJLAD, however, petitioners moved entirely outside this ADEA enforcement structure and failed to activate the ADEA remedial and enforcement provisions at all. In so electing, petitioners foreclosed any opportunity for the mediative resolution before litigation that is required by ADEA. Their appeal to federalism to preserve independent state court proceedings is misplaced because the ADEA's deferral requirement "is grounded not

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[14] "[S]ection 633(b) envisions a state authority equipped . . . to mediate genuine disputes [and] to attempt to resolve disputes through voluntary compliance . . ." *Eklund v. Lubrizol Corp.,* 529 F.2d 247, 249 (6th Cir. 1976), *overruled on waiver issue, Wright v. Tennessee,* 628 F.2d 949, 953 (6th Cir. 1980).

[15] In *Oscar Mayer & Co.,* this Court held that:

> ". . . under [§ 633(b)] of the ADEA, as under § 706(b) of Title VII, *resort to state administrative remedies in deferral States* by individual claimants is mandatory, not optional." *Id.* at 753.

Initial resort to state administrative remedies "is intended to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have no need or desire for independent federal relief." *Id.* at 761.

only in federalism . . . but also on a decision by Congress that courts and employers should be spared the burden of unnecessary litigation." *Hadfield v. Mitre Corp.*, 562 F.2d 84, 87 (1st Cir. 1977). Here, therefore, no deferral obligation on the part of EEOC arose and no right of suit under the ADEA eventuated—the ADEA was simply not part of the picture at all. *See, e.g., id.; Forman v. Block Drug Company,* 16 Fair Empl. Prac. Cases 414 (BNA) (E.D.N.Y. 1977).[16]

In sum, the direct suit elected by petitioners here forms no part of the joint federal and state *administrative agency* structure established by the ADEA. Since petitioners never activated their rights under the ADEA and because the right of direct suit forecloses vindication of crucial ADEA objectives, including an opportunity for a mediative resolution, preemption of petitioners' suit does not "alter, amend, modify, invalidate, impair or supersede" the ADEA, thereby making preemption mandatory. Even with

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[16] In *Forman,* the Court dismissed the ADEA suit of those plaintiffs who sued directly under N.J.S.A. § 10:5-13 without exhausting their administrative remedies before the New Jersey DCR. In the process, the Court described the ADEA's deferral policy in the following way:

> "We believe that this federal policy requires deferral to a state agency (but not to a state court) if one exists, even if the state statute permits an election between mutually exclusive remedies of administrative action or judicial proceedings."

Id. at 417; *accord,* Hadfield v. Mitre Corp., 562 F.2d at 87, n. 2 (in a State allowing the choice between administrative and judicial remedies for age discrimination, ADEA deferral prerequisite is not satisfied by bringing private action directly in State court).

petitioners' direct suit preempted, the NJLAD administrative enforcement structure is left intact so that the ADEA is ". . . enforced in precisely the same manner." *Shaw,* 463 U.S. at 103. On this separate but interrelated ground, the limited preemption found by the Supreme Court of New Jersey is plainly correct.[17]

III. Comments With Respect to The Lawfulness Under The ADEA of the HSSRP

As discussed above, resolution of the issue of ERISA preemption of the jurisdictional basis of petitioners' claim does not entail an examination of the merits of that claim. Because petitioners argue the point, we turn briefly to the merits and demonstrate that the HSSRP comes within the exemption in 29 U.S.C. § 623(f)(2) and is lawful, even apart from the exemption, under the core principles of the ADEA.

The claim lodged by petitioners is a groundless challenge to a socially responsible and entirely voluntary early retirement incentive program that was conced-

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[17] In an analogous situation, this Court recently reversed a state court decision on grounds of federal labor law preemption, noting that the "most harmful aspect" of the decision was that it would permit a state law suit to proceed when the plaintiff had not made prior use of a non-judicial remedy that federal law imposed as a prerequisite to filing suit in court. Allis Chalmers Corp. v. Lueck, 471 U.S. ___, ___, 105 S.Ct. 1904, 85 L.Ed. 2d 206, 220 (1985). *See also,* Utley v. Varian Associates, 625 F. Supp. 104 (N.D. Cal. 1985) (even if prohibitions of Executive Order 11246 were cognizable in a suit brought pursuant to a state employment discrimination statute, the provisions of the state statute allowing a direct court action were preempted as being incompatible with the administrative enforcement scheme of federal law.).

edly designed to benefit not only the participants, but also petitioners themselves, in the context of an unavoidable reduction in force. Although declining to rule on the legality of the HSSRP in view of the other grounds for dismissal discussed above, the court below intimated its view of the merits when it noted "... the apparent impediments to [petitioners'] claim posed by [the] savings provisions of [§ 29 U.S.C. § 623(f)(2) of the ADEA]." Pet. App. 3a. Indeed, the HSSRP meets all the tests for the *bona fide* plan exemption of the ADEA and, on this separate ground, petitioners' claim was properly preempted and dismissed.[18]

The ADEA explicitly exempts from its prohibitions any *bona fide* employee benefit plan that is not a subterfuge to evade the purposes of the statute. 29 U.S.C. § 623(f)(2).[19] As petitioners concede (Pet. 38), the HSSRP is a *bona fide* plan in that it exists and pays benefits. *United Air Lines, Inc. v. McMann,* 434 U.S. 192 (1977). Far from being a subterfuge to evade the ADEA,[20] the HSSRP is a completely *voluntary*

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[18] Under this Court's holdings in *Shaw* and *Alessi,* so much of the NJLAD as forbids what the ADEA allows is preempted. Shaw, *supra,* 436 U.S. at 105-06, Alessi v. Raybestos Manhattan, Inc., 451 U.S. 504 (1981).

[19] The ADEA exempts actions taken by an employer:

> in observance of the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter.

29 U.S.C. § 623(f)(2); *See* Pet. 5-6.

[20] Petitioners' argument to the contrary—that the HSSRP was designed to force older employees to retire (Pet. 38)—is pre-

reduction in force program which mirrors that provided by the federal government and held lawful in *Mason v. Lister,* 562 F.2d 343 (5th Cir. 1977). *See also, Patterson v. Independent School District No. 709,* 742 F.2d 465, 467 (8th Cir. 1984).

In *Mason,* as here, a voluntary early retirement incentive pension plan[21] was offered for a limited "window" period during a reduction in force ". . . to encourage more senior employees to leave the work force . . . voluntarily at an earlier than usual age to minimize the necessity of laying off younger employees during a period of staff reduction." *Id.* at 345.[22]

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posterous as is shown not only by the undisputed voluntary nature of the plan but also by the fact that the entire purpose of their lawsuit is to gain entry to the HSSRP, which they disingenuously label as a "subterfuge." *Compare* Coburn v. Pan American World Airways, 711 F.2d 339, 344 (D.C. Cir.), *cert. denied,* 464 U.S. 994 (1983); Henn v. National Geographic Society, 40 Fair Empl. Prac. Cases (BNA) 1186, 1187 (N.D. Ill. 1986).

[21] EEOC regulations expressly approve voluntary early retirement plans:

> Neither section 4(f)(2) nor any other provision of this Act makes it unlawful for a plan to permit individuals to elect early retirement at a specific age or at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age. 29 C.F.R. § 1625.9(f).

Several other courts also have sanctioned voluntary early retirement plans. *See e.g.,* Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 88-89 (6th Cir. 1982); Toussaint v. Ford Motor Co., 581 F.2d 812, 815-16 (10th Cir. 1978).

[22] The reports accompanying the Federal Employee Early Retirement Act, which created the program at issue in *Mason,* state these reasons for Congress's approval of plans such as the

Like petitioners, the *Mason* plaintiff had the requisite years of service but did not meet the attained age criterion within the "time window". In dismissing the ADEA suit, the Fifth Circuit ruled that the early retirement incentive pension plan was a *bona fide* pension plan which, because strictly optional with employees, was not a subterfuge. 562 F.2d 346. Thus, an age specific eligibility limit in a plan which has such benign purposes as the HSSRP is lawful and a person too young to satisfy the plan's limit has no claim. *Accord Patterson v. Ind. School Dist. #709, supra,* (*voluntary* early retirement incentive plan is *a fortiori* not a subterfuge).

As they have all along, petitioners recite to this Court an inapposite litany of cases dealing with the denial of lump-sum severance pay to older workers upon the closure of a plant: *Equal Employment Opportunity Commission v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984); *Equal Employment Opportunity Commission v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983); and *EEOC v. Great Atlantic and Pacific Tea Company,* 618 F. Supp. 115 (N.D. Ohio,

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HSSRP:

> "Reductions in force have a depressing effect on employee morale and result in severe personal hardships caused by loss of income and uncertainty regarding future employment. . . . To the extent that attrition, particularly in retirement, reduces the need for involuntary separations and the chain-effect displacement of employees with lower retention rights of [sic] those with higher retention rights, these hardships and disruptions are mitigated."

S.Rep. No. 152, 93d Cong., 1st Sess. 4-5 (1973); H.Rep. No. 93-38, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News at 1396, 1398.

1985) (Pet. 35-44). Here, unlike in the foregoing cases, age 55 and older employees were *included* in the HSSRP based on their eligibility for early retirement. Further, unlike the severance pay in the cases cited by petitioners, the HSSRP is not a mere fringe benefit but an ERISA pension plan providing its beneficiaries with retirement income over a number of years. The HSSRP thus qualifies for the ADEA § 4(f)(2) exemption even under those cases. *See Borden's*, 724 F.2d at 1396 (through the section 4(f)(2) exemption, "Congress sought to avoid disrupting pensions and other complex, on-going benefit schemes;" in contrast, Borden's severance pay was a "one-time, *ad hoc* cash payment"); *Westinghouse*, 725 F.2d at 224 ("By the express language of 4(f)(2), a plan qualifies if it is a retirement, insurance or pension plan").

The HSSRP is to be judged, if at all, against the background of the undisputedly benign purposes with which it was conceived. The eventual closure of respondent's facility does not "metamorphize" the HSSRP from its initial role to that of a mere severance program. Moreover, with its time "window" having "closed" long before the eventual closure of the plant, older workers were able to retire far in advance of any eventual involuntary separation that might occur upon closure and younger workers were able to earn wages, accrue service, and enjoy the other emoluments of a job longer than they might have without the plan. Petitioners' attempt to cast a discriminatory light on an honorable program designed for the benefit of the entire workforce is therefore a perverse distortion of the facts of record.

Even apart from the exception in 29 U.S.C. § 623(f)(2), the ADEA does not prohibit a program

such as the HSSRP, which favors older, voluntarily retiring employees. The HSSRP thus fosters the central purpose of the ADEA to help older employees (29 U.S.C. § 621) and the ADEA's policy to encourage generous treatment of older workers in recognition of their special problems. At the time the HSSRP was adopted, United States Department of Labor ("DOL") regulations allowed older workers to be benefited because of their age in a variety of contexts,[23] a policy continued by EEOC. *See* 29 C.F.R. § 1625.2(b); 46 Fed. Reg. 47724 (1981).

The HSSRP self-evidently fosters the ADEA policies embodied in these DOL and EEOC regulatory pronouncements. As is the federal government's own special early retirement program, the HSSRP is a completely rational and lawful way to address the needs of older employees who might otherwise experience disproportionate hardship. *See Mason v. Lister, supra,* 562 F.2d at 346; *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357 (D.N.J. 1982); *compare Rock v. Westinghouse Corp.*, 1 Mass. Discrim. L. Rep. 1262 (MCAD 1979), *aff'd sub nom. Rock v. Massachusetts Commission Against Discrimination,* Mass. ___, 424 N.E.2d 244 (1981). Accordingly, the

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[23] *E.g.*, U.S. Dept. of Labor Opin. No. WH 451 (Jan. 31, 1978) (upholds severance pay plan providing greater benefits to older workers because of their age); U.S. Dept. of Labor Opin. No. WH-419 (July 1, 1977) (allows employers to excuse older employees "from comparatively undesirable work assignments"); U.S. Dept. of Labor Opin. No. WH-404 (Aug. 26, 1976) (contracts may reserve certain number of positions for the older segment of the protected age group); U.S. Dept. of Labor Opin. No. WH-389 (June 25, 1976) (allows granting of "preferred status" in job bidding to certain employees aged 55 or older with 15 years of service).

HSSRP does not constitute unlawful age discrimination under the ADEA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.[24]

Respectfully submitted,

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[24] Petitioners' arguments (Pet. 44-49) addressed to the defense of "good faith reliance" on administrative regulations provided in § 10 of the Portal to Portal Act, 29 U.S.C. § 259 and adopted by the ADEA, are completely baffling as this particular contention was neither raised by respondent nor considered by the Supreme Court of New Jersey in its decision.

APPENDIX

APPENDIX A

AGE DISCRIMINATION ACT

29 U.S.C. § 633. Federal-State Relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated ***.

APPENDIX B

NEW JERSEY LAW AGAINST DISCRIMINATION

Sec. 10:5-13. Remedies; Complaint, Persons Entitled to File.

Any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination may, by himself, or his attorney-at-law, make, sign and file with the [D]ivision [on Civil Rights] a verified complaint in writing ***.

Sec. 10:5-14. Investigation of Complaint; Attorney General's Duties.

After the filing of any complaint, the Attorney General shall cause prompt investigation to be made in connection therewith and advise the complainant of the results thereof. If the Attorney General shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful employment practice or the unlawful discrimination complained of by conference, conciliation and persuasion during a period terminating not later than 45 days from the date of the finding of probable cause.

Sec. 10:5-18. Rules of Practice; Limitations.

The Attorney General shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and his own actions thereunder. Any complaint filed in the division or in any municipal office persuant to this act must be so filed within 180 days after the alleged act of discrimination.

APPENDIX C

NEW JERSEY STATUTES ANNOTATED

Limitations of Actions

2A:14-1. 6 Years

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.